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No. _____

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE,
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 21, 1987 **Counsel of Record*

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QUESTIONS PRESENTED

The Court of Appeals for the Sixth Circuit found the Department of Labor regulation, 20 C.F.R. § 727.203, invalid as contrary to the "not more restrictive" language of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2). It then took the additional step of substituting the Health, Education and Welfare regulation, 20 C.F.R. § 410.490, to adjudicate black lung claims under Department of Labor jurisdiction.

The following questions are thus presented:

1. Does the DOL regulation at 20 C.F.R. § 727.203 comply with the statutory mandate of 30 U.S.C. § 902(f)(2) requiring Labor's regulations not be more restrictive than former criteria of the HEW.

2. Is the lower court empowered to substitute HEW regulations for those of the DOL and force DOL to adjudicate Part C claims under HEW standards, without violating the rule-making provisions of the Administrative Procedure Act?

3. Whether application of HEW regulations to Part C claims provides Operators and their insurance carriers a full and fair hearing consistent with the Fifth Amendment to the United States Constitution and the Administrative Procedure Act.

4. Whether the HEW regulation is invalid as creating presumptions of disability and causation inconsistent with the requirements of the Black Lung Benefits Act, 30 U.S.C. §§ 921(c)(1) and 932(c).

PARTIES TO THE PROCEEDING

This action originated with a claim for black lung benefits by Fred Kyle, alleging total disability from coal workers' pneumoconiosis as a result of 8½ years of coal mine employment. His former employers were not named in the suit because Mr. Kyle's last coal mine employment ended in 1951 and the statute prohibited Operator liability for pre-1970 employment. 30 U.S.C. § 932(j)(2). Instead, the Director, Office of Workers' Compensation Programs was named as a party-in-interest, representing the Black Lung Disability Trust Fund which became liable for benefits in the absence of a responsible Operator. 26 U.S.C. § 9501(d)(1)(B). The Director is also the administrator of the Federal Black Lung Program.

The National Council on Compensation Insurance ("NCCI") intervened at the Court of Appeals for the Sixth Circuit. The NCCI is a nonprofit, voluntary association of insurance companies, insuring and reinsuring workmen's compensation policies. A significant portion of this insurance and reinsurance business involves coverage of coal mine operators under Part C of the Black Lung Benefits Act. NCCI also administers the National Workers Compensation Reinsurance Pool which reinsures policies under the Act and provides direct coverage to coal operators unable to secure insurance in the open market. In addition, NCCI prepares rating plans for compensation insurance in thirty-five states. Once effective, these rating plans help determine the cost of compensation insurance. The NCCI also has a wholly owned subsidiary known as Insurance Technical and Archiaval Consultants Corporation.

NCCI intervened in the court below, seeking to protect the interests of its member companies compelled, under *Kyle's* mandate, to adjudicate Part C cases under

Part B rules. (App., at 13a). By substituting § 410.490 for § 727 for Part C claims, including Operator-defended claims, *Kyle* imposed a new regulatory scheme upon Operators and their insurance carriers.

NCCI is the Petitioner herein and all other parties below are Respondents.

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DEPARTMENT OF LABOR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, National Council on Compensation Insurance, respectfully requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 819 F.2d 139. (App., at la). The Order of the Court of Appeals granting intervenor's motion to intervene is unreported. (App., at 12a). The Order denying intervenor's Petition for

Rehearing and Suggestion for Rehearing En Banc is unreported. (App., at 11a).

JURISDICTION

The decision of the Court of Appeals was filed on May 18, 1987. Separate Petitions for Rehearing were filed by the government and by the intervenors. Both petitions were denied by an Order dated September 22, 1987. (App., at 11a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The due process provisions of the Fifth Amendment to the Constitution of the United States. (App., at 30a).

2. The equal protection component of the Fifth Amendment to the Constitution of the United States. (App., at 30a).

3. The Administrative Procedure Act, 5 U.S.C. § 553 (pertaining to notice and comment). (App., at 30a).

4. The Administrative Procedure Act, 5 U.S.C. § 556(d) (pertaining to full and fair hearings). (App., at 32a).

5. The Black Lung Benefits Act, § 402(f)(2), 30 U.S.C. § 902(f)(2). (App., at 33a).

6. The regulations of Health, Education & Welfare, 20 C.F.R. § 410.490. (App., at 34a).

7. The regulations of Department of Labor, 20 C.F.R. § 727.203. (App., at 37a).

STATEMENT OF THE CASE

A. Statutory Background

The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1986) (the "Act") is a comprehensive statute, providing monetary compensation to coal miners totally disabled from coal workers' pneumoconiosis[1] as a result of their employment. 30 U.S.C. § 901(a). The Act classifies claims according to their date of filing, creating two parts of the statute known simply as Parts B and C. Part B represented the initial phase of the statute wherein the federal government assumed liability for successful miners who filed claims before June 30, 1973.[2] This initial phase of the program was administered by the Department of Health, Education & Welfare ("HEW"). 30 U.S.C. § 921. Whereas, Part C represented the larger, permanent phase of the program governing claims filed after December 31, 1973.[3] Successful Part C claimants received benefits from their coal mine employers and their insurers rather than from the

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[1]In a purely medical sense, "pneumoconiosis" is a reaction of the lungs to inhaled mineral or organic dusts. W.R. PARKS, OCCUPATIONAL LUNG DISORDERS, 2 (2nd ed. 1982). Coal mine dust is one of the organic dusts that may produce a pneumoconiosis, which is then referred to as "coal workers' pneumoconiosis." Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W.Va.L.Rev. 721, 728-729 (1981). Whereas, the statutory definition of pneumoconiosis is more narrow than the medical definition, referring only to coal workers' pneumoconiosis. 30 U.S.C. § 902(b).

[2]30 U.S.C. § 921-925.

[3]30 U.S.C. § 931-945. Due to the sequence of amendment, a gap appears between the end of Part B and the beginning of Part C. Claims filed during this period are known as "transition period" claims because they were filed during the transition from Part B to Part C. 30 U.S.C. § 925. Transition period claims were administered by the DOL but paid by the government for any month prior to January 1, 1974. *Id.*

federal government.[4] Adjudication of Part C claims would thus involve notice to potentially liable coal mine operators ("Operators") and a corresponding opportunity to defend that liability. As Part C came into effect, administrative responsibility shifted from the HEW to the Department of Labor ("DOL"). The DOL would administer Part C claims while HEW retained responsibility for administration of Part B claims. Notwithstanding this division of administrative responsibility, only the HEW was given authority to draft regulations governing entitlement.[5] These regulations were first promulgated on April 7, 1970, 35 Fed. Reg. 5623, and later became known as "Subpart D" standards. 20 C.F.R. § 410.401.

The Act was first amended in 1972[6] expanding the definition of total disability and bringing surface miners within the Act. The legislative hearings preceding the 1972 amendments revealed a Congress critical of the Subpart D regulations and the backlog of claims they created, prompting HEW to promulgate "interim" standards. 20 C.F.R. § 410.490. These interim standards, adopted on September 30, 1972, reduced the backlog of claims by liberalizing the claimant's medical burden for establishing disability and by creating generous presumptions of disability once medical evidence was offered.[7] These interim

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[4]30 U.S.C. § 932. Insurance coverage is mandatory under the Act, either by qualifying as self-insurer or purchasing proper workmen's compensation coverage. 30 U.S.C. § 933.

[5]Federal Coal Mine Health And Safety Act of 1969, Pub.L.No. 91-173, Title IV, § 411(b), 83 Stat. 742 (1969)

[6]Black Lung Benefits Act of 1972, Pub.L.No. 92-303, 86 Stat. 150 (1972).

[7]For example, standards for disability as measured by ventilatory studies were reduced. *Compare* 20 C.F.R. § 410.426(b) with 20 C.F.R.

(Continued on next page)

standards, however, had no practical effect on Part C claims administered by the DOL for the regulation was strictly limited to Part B claims under HEW jurisdiction.[8] Without authority to apply § 410.490 and lacking its own rule-making power, the DOL was left to apply the pre-1972 regulations to Part C claims while the HEW applied the more liberal § 410.490 to Part B claims.

Congress amended the Act again in 1977,[9] broadening coverage of the Act by expanding the definition of "miner" and by enlarging the definition of "pneumoconiosis" to include virtually any respiratory impairment which might arise out of coal related employment. Congress decided that all claims pending or denied under the pre-1977 standards deserved reconsideration under the newer and more liberal amendments. Claimants in this category could elect to have their "pending or denied" claims revived and reviewed under the new statutory and regulatory standards. 30 U.S.C. § 945. Finally, the 1977 amendments conferred rule-making authority upon the DOL with respect to Part C claims.[10] However, the new DOL regulations for these "review" claims could not be more restrictive than criteria applicable on June 30, 1973 (e.g., § 410.490). *See*, 30 U.S.C. § 902(f)(2). The DOL adopted its own interim regulations on August 18, 1978. 20 C.F.R. § 727.203.

(Continued)

§ 410.490(b)(l)(ii). A claimant could produce much higher values on ventilatory studies under § 410.490 and still be found disabled.

[8]Section 410.490 was interpreted as applying only to Part B claims. *Young v. Harper Valley Coal Corp.*, 2 B.L.R. 1-167, 174 (1979).

[9]Black Lung Benefits Reform Act of 1977, Pub.L.No. 95-239, 92 Stat. 95 (1978).

[10]*Id.* at § 402(f)(1)

Like its HEW predecessor, the DOL regulations contained presumptions of disability for claimants with positive X-rays or lowered ventilatory study values. 20 C.F.R. § 727.203(a). Unlike its predecessor, § 727 would allow invocation of the presumption by arterial blood gas studies and medical opinions of disability. 20 C.F.R. § 727.203(a)(3)&(4). However, the DOL regulation imposed a ten year employment threshold as a prerequisite to the availability of the presumption of disability. 20 C.F.R. § 727.203(a). The HEW and DOL regulations also set different rebuttal standards. Section 410.490 allowed rebuttal of the "presumed" disability only where: (a) the claimant was actually working; or (b) the claimant was physically able to work. 20 C.F.R. § 410.490(c). Whereas, § 727 permitted the above rebuttal *plus* two additional methods. These were proof that the miner did not have pneumoconiosis, or that his disability was unrelated to coal mining. 20 C.F.R. § 727.203(b)(3) & (4).

Congress amended the Act again in 1981.[11] Unlike prior changes, these amendments restricted eligibility under the Act by repealing three of the five presumptions based upon a miner's length of coal mine employment.[12] These presumptions were repealed prospectively, meaning they would not be available for claims filed after the effective date of the 1981 amendments. Just prior to tnese

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[11]Black Lung Benefits Revenue Act of 1981, Pub.L.No. 97-119, 95 Stat. 1635 (1981)

[12]These five presumptions are set forth at 30 U.S.C. § 921(c). The only presumptions which remain in effect after 1981 related to (1) a presumption of casual relationship of disease to employment where the miner has 10 or more years of employment; and (2) an irrebuttable presumption of total disability where the miner has "complicated" pneumoconiosis. *Id.*

amendments, the DOL promulgated a final series of regulations to serve as permanent standards. These permanent standards governed all claims filed after March 31, 1980. 20 C.F.R. § 718.

The administration of the Act is thus divided between two agencies, each with distinct regulations and separate categories of claims and parties. Despite continuing legislative tinkering, the original distinction between Part B and C claims remains a permanent fixture of the statute.

B. Factual Background

Fred Kyle sought federal black lung benefits by application of February 15, 1980, meaning that his was a Part C claim normally governed by § 727 regulations of the DOL. He was ineligible for the HEW regulation at § 410.490 because his claim was not filed on or before June 30, 1973 and, accordingly, was not a Part B filing.

The DOL evaluated Mr. Kyle's application under § 727, and denied his claim. Formal hearing was held on May 25, 1982 before an Administrative Law Judge resulting in a second rejection of the claim. (App., at 24a). Although he had evidence of pneumoconiosis, Mr. Kyle had only 8½ years of coal mine employment and could not meet the ten year employment threshold of § 727.203(a). He appealed to the Benefits Review Board, which affirmed the denial of benefits in an unpublished opinion. (App., at 19a).

The Court of Appeals for the Sixth Circuit reversed and remanded, accepting Mr. Kyle's argument that Part B rules of § 410.490 applied to his Part C claim. (App., at 10a). The Court interpreted the "not more restrictive" language of 30 U.S.C. § 902(f)(2) as mandating the use of § 410.490, believing that DOL regulations at § 727 were

"more restrictive" than § 410.490 for miners with less than 10 years of coal mine employment. In the Court's view, Mr. Kyle would be entitled to the presumption under § 410.490 based on the evidence of record. (App., at 4a). Whereas, that same evidence could not entitle the claimant to the § 727 presumption of disability because of the ten year requirement. Thus, the ten year threshold of § 727.203(a) violated the "not more restrictive" statutory standard.

Rather than remove the "unacceptable" regulatory language, the Court of Appeals substituted the Part B regulation for the DOL regulatory scheme. As a result, § 410.490 has been wrenched from Part B and forcibly applied to Part C of the statute, including Operator-defended claims. Thus, *Kyle* imposes a new regulatory scheme upon Operators and their insurance carriers.

REASONS FOR GRANTING THE WRIT

The expansion of § 410.490 to Part C has become a fashionable issue in the lower courts around the nation. Unfortunately, engrafting a regulatory scheme of governmental liability onto a statutory scheme of Operator liability is fraught with difficulty. The resultant problems are manifested by petitions for certiorari generated virtually every time a court of appeals has restyled the regulatory framework. *Petition for Writ of Certiorari, Pittston Coal Group v. Sebben,* No. 87-821 (Sup.Ct., filed November 20, 1987); *Petition for Writ of Certiorari, Whitfield v. Sebben,* No. 87-827 (Sup.Ct., filed November 20, 1987). *See also, Application for Extension of Time to file Petition for Writ of Certiorari, Whitfield v. Kyle,* No. A-458, (Sup.Ct., filed December 9, 1987). The primary issue in all of these cases is whether § 727 conforms to the statutory mandate of 30

U.S.C. § 902(f)(2). The secondary issue is whether § 410.490 can be substituted for § 727 by the Court of Appeals to govern Part C claims adjudication. The parties in *Sebben* preserved some of these issues, but only *Kyle* embraces all of them. As the Solicitor General observed in his *Sebben* petition, review in that case is warranted only if § 727 violates the statutory mandate. *Petition for Writ of Certiorari, Whitfield v. Sebben, at 6,* No. 87-827 (Sup.Ct., filed November 20, 1987). The Solicitor General is correct for the cumbersome mandamus issues in *Sebben* are likely to obfuscate the real question concerning the regulations. The application of § 410.490 to Part C is a significant issue affecting the coal mining and insurance industries, which are liable for the greatest bulk of Part C cases. Those industries should, therefore, have a voice in the outcome of this important issue. As *Kyle* involves such an industry presence, its review will present the most practical and efficient challenge to the errant use of § 410.490.

1. Conflict Among the Circuits

Kyle found § 727 invalid as the regulation was "more restrictive" than HEW criteria contrary to the statutory command at 30 U.S.C. § 902(f)(2). In the process, the Sixth Circuit rejected DOL's argument that the restrictive language in the statute applied to medical, but not evidentiary standards. (App., at 7a). Rather than eliminate the offending regulatory language, *Kyle* directed that § 410.490 determine the eligibility of the Part C claim at issue. (App., at 10a). Faced with the same argument, the Seventh Circuit reached a contrary result in *Strike v. Director, Office of Worker's Comp. Programs,* 817 F.2d 395 (7th Cir., 1987). The *Strike* court concluded that the DOL regulations complied with the Act as the "not more restrictive" language applied to medical rather than evidentiary criteria. *Id.* at

404-05. The Seventh Circuit has thus upheld the DOL regulation on precisely the same ground that prompted the Sixth Circuit to find it invalid.

Conversely, the Third Circuit decided that neither § 410.490 nor § 727 would apply to Part C claimants with less than 10 years of coal mine employment. Instead, the Third Circuit applied the permanent § 718 regulations even though they had not been promulgated when the claim was filed. *Caprini v. Director, Office of Worker's Comp. Programs,* 824 F.2d 283, 284 (3d Cir., 1987). The Third, Sixth and Seventh Circuit decisions are hopelessly irreconcilable as each would apply a different regulatory standard to the same claim.

Disharmony abounds even where the circuits purportedly agree to apply § 410.490 to Part C claims. Consider, for example, the selective and arbitrary manner of its application. The Third Circuit[13] originally applied § 410.490 to a limited number of claims, corresponding only to those "reviewed" under 30 U.S.C. § 945. *Halon v. Director, Office of Worker's Comp. Programs,* 713 F.2d 21, 25 (3d Cir., 1983) (read § 902(f)(2) and § 945 together). Claims reviewed under § 945 were those filed *before* March 1, 1978 which sought or elected reconsideration under the 1977 amendments. Conversely, the Fourth Circuit has prospectively applied § 410.490 to any claim, currently pending, that had been filed before March 31, 1980. *Broyles v. Director, Office of Worker's Comp. Programs,* 824 F.2d 327, 329 (4th Cir., 1987). There is obviously a two year discrepancy (1978-1980) between the use of § 410.490 in the Third Circuit when compared to the Fourth Circuit.

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[13]The Third Circuit in *Halon* is generally cited as the seminal case applying § 410.490. In light of the more recent opinion in *Caprini, supra.*, it is unclear what direction the Third Circuit will follow.

This discrepancy is slight, however, when compared to the grandiose plan of the Eighth Circuit, resurrecting any claim with less than 10 years of coal mine employment that had been filed between December 31, 1969 and March 31, 1980 for re-adjudication under § 410.490. *In re Sebben,* 815 F.2d 475, 484-85 (8th Cir., 1987), *cert. filed,* (Nos. 87-821 & 87-827, filed November 20, 1987). Among the various circuits joining the § 410.490 bandwagon, there is a clear difference of opinion on what Part C claims may be benefited.

Rebuttal serves as another point of departure for the lower courts. The Third Circuit is uncertain which regulation will govern rebuttal. *Sulyma v. Director, Office of Worker's Comp. Programs,* 827 F.2d 922 (3d Cir., 1987) (rebuttal under § 410.490); *but see, Caprini v. Director, Office of Worker's Comp. Programs,* 824 F.2d 283 (3d Cir., 1987) (invocation and rebuttal governed by § 718). Whereas, the Eighth Circuit necessarily applies § 410.490 to rebuttal of the presumption. *In re: Sebben, supra.,* at 481 (§ 727 overturned leaving only § 410.490). The Sixth Circuit takes a different approach, using § 727 to determine rebuttal standards, but § 410.490 to determine invocation of the presumption. *Prater v. Hite Preparation Co.,* 829 F.2d 1363, 1366n.2 (6th Cir., 1987). Hence, the Sixth Circuit stands alone in simultaneously applying selected portions of § 410.490 and § 727 to the same claim.

This inscrutable array of cases produces an intolerable environment for credible, uniform administration of nationwide legislation. It befuddles insurance companies who cannot determine which of three regulations will govern claims, particularly when the third, fourth and sixth circuits involve states with contiguous borders and heavy

concentrations of coal mining industries.[14] The hodgepodge of regulatory standards applied throughout these circuits suggests that final outcome of litigation is dependent upon the circuit in which the case is tried. This ambiguity and contrariety has intensified with each new decision, leaving no hope these conflicts will evaporate absent review by this Court.

2. Conflict Between Court of Appeals and Supreme Court

This Court's most recent analysis of the black lung benefits program occurred in *Mullins Coal Co. of Virginia v. Director, Office of Workers' Comp. Programs*, No. 86-327 (Sup.Ct., filed December 14, 1987). While not directly confronted with the argument that § 727 violated its statutory mandate, the majority carefully observed that the DOL regulation "satisfied Congress' demand that Labor's criteria shall not be more restrictive" than HEW's. *Id.* Certainly, *Kyle's* holding is directly at odds with the majority's view of the statute.

Kyle was rendered by an appellate court reviewing the propriety of DOL rule-making pursuant to 30 U.S.C. § 923(a).[15] Admittedly, the court was authorized to determine the validity of the agency rule. However, authority to review agency rule-making does not also empower the court to fashion a replacement for the offending regulation. *Vermont Yankee Nuclear Power Corp. v. Natural*

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[14]These contiguous states are Pennsylvania, West Virginia and Ohio referring to the Third, Fourth and Sixth Circuits, respectively. 28 U.S.C. § 41.

[15]More specifically, appellate review was pursuant to provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c). These provisions were incorporated into the Black Lung Benefits Act by 30 U.S.C. § 923(a). *Accord, Butcher v. Big Mountain Coal, Inc.*, 802 F.2d 1506, 1507 (4th Cir., 1986).

Resources Defense Council, 435 U.S. 519, 525 (1978); *F.C.C. v. Schreiber,* 381 U.S. 279, 290-91 (1965). The Sixth Circuit crossed this barrier when, after invalidating the 10 year requirement of § 727, it directed the agency to replace the *entire regulation* with § 410.490. (App., at 10a). The lower court improperly engrafted its notion of a "proper rule" upon the DOL contrary to the clear proscriptions of this Court.

Such judicial rule-making also violates the "notice and comment" provisions of the Administrative Procedure Act, 5 U.S.C. § 533 (1986) ("APA"), as the use of the rule in Part C cases exceeds the published notice that accompanied the rule. This Court overturned similar judicial forays into rule-making procedures as failing to comply with the APA. *Heckler v. Lopez,* 463 U.S. 1328, 1333-34 (1983); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759, 764-65 (1969).[16]

3. Section 410.490 is a Defective Regulation

Another factor militating in favor of certiorari is the confiscatory nature of § 410.490. The total absence of any reasonable defense to the presumption may not have disturbed the regulator-government, but it does offend an industry now to be regulated by the same rule. Stated differently, that the government may unjustly deprive itself of monetary benefits under Part B is one thing; that it will deprive Operators in the same way under Part C is entirely another. The use of § 410.490 to determine the liabilities of

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[16]In this context, it is of little concern that courts are excluded from the APA. 5 U.S.C. § 551(1)(B). As appellate courts have no authority to prescribe administrative rules, the exclusion cannot confer power outside the APA framework which the court did not possess within that framework.

regulated-industry is wholly foreign to the design and intent of the rule.

(a) Due Process Violations

Procedural due process requires the opportunity to be heard at a meaningful time and in a meaningful way. *Armstrong v. Manzo,* 380 U.S. 545, 552, (1965). It must offer parties the opportunity to present their case and have its merits fairly judged. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982). These fundamental opportunities are denied Operators under § 410.490 for the rule obviates all defenses except that (1) the miner is performing his usual employment; or (2) the miner is capable of performing his usual coal mine work. 20 C.F.R. § 410.490(c). This deprives litigants of a "meaningful opportunity" to contest the existence of pneumoconiosis and whether the miner's disability is related to employment.[17] *Accord, Cook v. Director, Office of Worker's Comp. Programs,* 816 F.2d 1182, 1184, (7th Cir., 1987) (no § 410.490 rebuttal by medical evidence). Thus, even where an Operator can disprove one of the three conditions of entitlement,[18] § 410.490 would still compel benefits. *Contra, Mullins Coal Co. of Virginia v. Director, Office of Workers' Compensation Programs,* No. 86-327 (Sup.Ct., filed December 14, 1987). The inadmissability of causation evidence also raises the constitutional question of whether the § 410.490 presumption offers a rational connection between what is proven and what is presumed as a result. There is no constitutional

---

[17]Limiting evidence that Operators may introduce would also contravene the full and fair hearing requirement of the APA. 5 U.S.C. § 556(d).

[18]These three conditions of entitlement are embodied in 30 U.S.C. § 901 and include (1) total disability; (2) due to pneumoconiosis; (3) arising out of coal mine employment.

predicate for presuming causation where evidence tending to disprove it is inadmissible. *Mullins, supra.* at ____ n.32.

(b) Equal Protection Violation

The equal protection component of the due process clause of the Fifth Amendment to the United States Constitution imposes upon the federal government the same equal protection standards applicable to the states under the Fourteenth Amendment. *Schweiker v. Wilson,* 450 U.S. 221, 226 (1981); *Weinberger v. Salfi,* 422 U.S. 749, 768-70 (1975). In cases of social welfare legislation, equal protection requires that discriminatory treatment be rationally related to a legitimate governmental objective. *United States R.R. Retirement Bd. v. Fritz,* 449 U.S. 166, 175 (1980). In the case of § 410.490, the regulation accepts evidence when proffered by miners, but precludes the same type of evidence when offered by Operators or insurance carriers, thus discriminating against Operators and carriers. For example, § 410.490(b)(l)(i) requires X-ray evidence before claimants can invoke the interim presumption of disability. Similarly, § 410.490(b)(2) contemplates medical opinion-evidence by the claimant to establish the casual relationship of disability to his former employment.[19] Conversely, the rebuttal provisions governing defense of these claims make no allowance for Operators to submit either X-ray evidence or medical opinion contesting causation. 20 C.F.R. § 410.490(c). This arbitrary rejection of Operator evidence is unrelated to any governmental objective. Indeed, it is contrary to the Congressional purpose of benefiting only miners disabled due to pneumoconiosis. 30 U.S.C. § 901(a). The regulation cannot condition the

[19]Section 410.490(b)(2) does not specifically mention medical opinion, referring only to proof of casual relationship. However, there is no means to establish casual relationship apart from medical opinion.

admissibility or relevancy of evidence upon the identity of its sponsor and conform to the requirements of equal protection as defined by this Court.

(c) Inconsistency with Enabling Legislation

Regulations must be consistent with the statute under which they are promulgated. *United States v. Larionoff,* 431 U.S. 864, 873 (1977). Section § 410.490 cannot meet this basic standard as is vividly illustrated by comparing the regulation with related provisions of the Act. The Act provides that miners possessing 10 or more years of coal mine employment will be entitled to a "rebuttable" presumption their pneumoconiosis arose out of coal mine employment. 30 U.S.C. § 921(c)(3). This language clearly implies an avenue of rebuttal. While § 410.490 affords an equivalent presumption upon proof of 10 years of coal mine employment, 20 C.F.R. § 410.490(b)(2), it does not allow for rebuttal of this presumption by any means. The regulatory presumption thus conflicts with the statutory presumption. In similar fashion, § 410.490(c) does not allow Operator contests on the issue of causation. Whereas, the Act specifically states that no Operator shall pay benefits for disability which did not arise, in whole or in part, out of employment. 30 U.S.C. § 932(c). The regulation is out of harmony with the statute and, therefore, invalid.

CONCLUSION

The petition for writ of certiorari should be granted either independent of or in conjunction with the petition of the Solicitor General in *Kyle v. Director, Office of Workers' Compensation Programs,* 819 F.2d 139 (6th Cir., 1987) and *Broyles v. Director, Office of Workers' Compensation Programs,* 824 F.2d 327 (4th Cir., 1987).

Respectfully submitted,

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87 1065

Supreme Court, U.S.
FILED
DEC 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE,
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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42 pp

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FRED KYLE, *Petitioner,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS. UNITED STATES DEPARTMENT OF LABOR,
Respondents

No. 85-3535.

United States Court Of Appeals,
Sixth Circuit,

Argued Oct. 2, 1986.

Decided May 18, 1987.

Julian N. Henriques (argued), Legal Asst. Foundation of Chicago, Jean Goodwin, Legal Asst. Foundation, Chicago, Ill., for petitioner.

J. Michael O'Neill, Sylvia T. Kaser (argued), Washington, D.C., for respondents.

Before MERRITT, GUY and NORRIS, Circuit Judges.

ALAN E. NORRIS, Circuit Judge.

Fred Kyle seeks review of an order of the Benefits Review Board of the United States Department of Labor which affirmed the decision of the Administrative Law Judge to deny him benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.*

In essence, Kyle's appeal is grounded on two contentions—first, that the A.L.J. erred by failing to consider his entitlement to an "interim presumption" of disability under 20 C.F.R. § 401.490 in connection with his claim for

benefits, and second, that when that "interim presumption" is utilized he is entitled to black lung benefits as a matter of law. In addition, Kyle disputes some of the factual findings of the A.L.J., but, as our review of the record leads us to conclude that these findings are supported by substantial evidence, they may not be set aside on appeal. *Moore v. Califano,* 633 F.2d 727, 729 (6th Cir. 1980). However, because we agree with Kyle's first contention, we reverse the Board's decision and remand for further proceedings.

On February 15, 1980, petitioner Kyle filed his claim for benefits. This claim was subsequently denied and Kyle requested a hearing. This hearing was held on May 25, 1982, and the A.L.J. made the following findings of fact: that Kyle was a coal miner for approximately eight and one-half years, ending in 1951; that he had pneumoconiosis which was depicted by X-ray; that blood gas and pulmonary function studies were within normal limits; that S.M. Hessl, M.D., examined Kyle in May 1980 and diagnosed chronic bronchitis and coal miner's pneumoconiosis arising out of his coal mine employment; that Dr. Hessl also found Kyle had an AMA Class III respiratory impairment, arteriosclerotic heart disease and right bundle branch block; and that Kyle's file was referred to a medical consultant, who concluded that he was not totally disabled from pneumoconiosis and that any respiratory disability that he had was the result of smoking. The A.L.J. determined that Kyle had not met his burden on proving that he was totally disabled from pneumoconiosis, and that he was therefore not entitled to black lung benefits.

In order to be eligible for benefits under the Act, a miner must demonstrate that he is totally disabled due to

pneumoconiosis. 30 U.S.C. §§ 901(a), 902(b). To aid claimants in meeting this burden, the agencies which have administered the benefits program have provided a number of presumptions. The presumption at issue here is the one found in 20 C.F.R. § 410.490, which states, in part:

> (b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973 . . . such miner will be presumed to be totally disabled due to pneumoconiosis . . . if:
>
> (1) One of the following medical requirements is met:
>
> (i) A chest roentgenogram (X-ray) . . . establishes the existence of pneumoconiosis . . .
>
> . . .
>
> (2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment . . . .
>
> . . . .
>
> (c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:
>
> (1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work. . . .

Because Kyle's claim was filed long after July 1, 1973, it would seem that he would not be able to claim the benefit of this presumption. However, Kyle contends that he is entitled to the presumption in view of a 1977 amendment to the Black Lung Benefits Act:

> (f)(1) The term "total disability" has the meaning given it by regulations of . . . the Secretary of Labor . . . except that—

. . . .

(2) Criteria applied by the Secretary of Labor in the case of—

(C) any claim filed on or before the effective date [March 31, 1980] of regulations promulgated under this subsection by the Secretary of Labor;
shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 902(f)(2) (emphasis added).

Kyle argues that the effect of the "shall not be more restrictive" language of this amendment is to require that his case be decided in light of legal criteria in place on June 30, 1973, and that includes 20 C.F.R. § 410.490. Because the A.L.J. found that an X-ray established the existence of pneumoconiosis, and Dr. Hessl concluded that Kyle's pneumoconiosis arose out of coal mining, it is apparent that, had the A.L.J. considered Kyle's claim in the light of Section 410.490 and also concluded that Dr. Hessl's report established causation, then Kyle would have been entitled to the presumption of total disability due to pneumoconiosis.

However, the Department of Labor contends that Kyle failed to raise this issue at any stage of the proceedings below, and he is therefore precluded from raising it before this court for the first time.

While an appellate court generally will not address an issue which was not presented below, an exception is made when raising the issue would have been futile. *See, e.g., Youakim v. Miller,* 425 U.S. 231, 235, 96 S.Ct. 1399, 1402,

47 L.Ed.2d 701 (1976); *Penland v. Warren County Jail*, 759 F.2d 524, 531 n. 6 (6th Cir. 1985). At the time of the A.L.J.'s decision, the Board had rejected the application of Section 410.490 sought by Kyle. *See Lynn v. Director, Office of Workers' Compensation Programs*, 3 BLR 1-125, 126 (1981). The Board has also consistently held that it will not allow an A.L.J. to consider 20 C.F.R. § 410.490 in connection with claims filed after July 1, 1973, unless that consideration is required by the court of appeals of that particular circuit. *See, e.g., Kimmel v. Diamond Coal Co.*, 6 BLR 1-288, 291-93 (1983). In *Kimmel*, which was decided almost two years before the Board's decision in this case, the Board held that it would not apply Section 410.490 to claims arising in the Sixth Circuit which were filed after July 1, 1973. Accordingly, it would have been futile for Kyle to raise the argument.

The department next argues that, because Kyle's claim was not filed before July 1, 1973, the language of Section 410.490 itself precludes his reliance upon its presumption. It disputes Kyle's contention that the "shall not be more restrictive" language of the 1977 amendment to 30 U.S.C. § 902(f)(2) revives the application of the Section 410.490 presumption to him, since the department contends that the language refers not to evidentiary or adjudicatory criteria such as length of service, but only to medical criteria. It further maintains that the congressional mandate was complied with in the promulgation of 20 C.F.R. § 727.203, which is the regulation governing entitlement to an interim presumption, in later filed claims like Kyle's. That regulation establishes medical standards similar to those in Section 410.490, but it also includes an additional requirement that the miner have ten years of coal mine

employment before he can qualify for the presumption of total disability due to pneumoconiosis.

While courts often defer to an interpretation given a statute by an agency charged with its administration, *see, e.g., United States v. Riverside Bayview Homes,* 474 U.S. 121, 106 S.Ct. 455, 88 L.Ed.2d 419 (1985), this deference is tempered by the role of the courts as "the final authorities on issues of statutory construction . . . [who] 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.' " *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726, 745-46, 93 S.Ct. 1773, 1784-85, 36 L.Ed.2d 620 (1973) (citations omitted). Manifestly, the term "criteria" is subject to numerous possible interpretations. Accordingly, we need to examine its utilization by the Congress, in the context of other statutory language, and of the history and purpose of the Black Lung Benefits Act, in order to determine whether it should be assigned the narrow meaning urged by the department. *See Local 705. International Brotherhood of Teamsters v. Daniel,* 439 U.S. 551, 565-66, 99 S.Ct. 790, 799-800, 58 L.Ed.2d 808 (1979); *Southeastern Community College v. Davis,* 442 U.S. 397, 411, 99 S.Ct. 2361, 2369, 60 L.Ed.2d 980 (1979).

An examination of legislative history reveals that adopting such a narrow meaning of the term "criteria" would be inconsistent with the purpose of the Act as articulated by several congressional sources. The general purpose of both the 1972 and 1978 amendments to the Act appears to have been to liberalize the standards under which black lung benefits were being awarded at the time. *See* S.Rep. No. 743, 92d Cong.2d Sess. 17, *reprinted in*

1972 U.S. Code Cong. & Ad.News 2305, 2320-21; H.R.Rep. No. 151, 95th Cong.2d Sess. 4, *reprinted in* 1978 U.S. Code Cong. & Ad. News 237, 240. The Third Circuit, in *Echo v. Director, Office of Workers' Compensation Programs,* 744 F.2d 327, 330 (3d Cir. 1984), exhaustively reviewed congressional purpose in regards to the Act and concluded that:

> The legislative history of the Black Lung Program demonstrates a clear pattern. Congress passed a statute intended to provide wide-spread benefits to miners disabled by black lung disease. The benefits, while never very high, were intended to be liberally awarded. Administrative practice, however, did not comport with legislative intent, and twice Congress was impelled to specify its intentions more clearly, "in order to insure as broad coverage as possible." (Citation and footnote omitted.)

Examination of the language of the statute also leads us to reject the department's interpretation of the term "criteria." The department insists that its reading of the term is correct because a sentence found in the subsection immediately preceding 30 U.S.C. § 902(f)(2) states that "the Secretary of Labor . . . shall establish *criteria for all appropriate medical tests* under this subsection which accurately reflect total disability in coal miners" [30 U.S.C. § 902(f)(1)(D) (emphasis added)], and the use of the word "criteria" in the following subsection must be parallel to its previous use. To further buttress this contention, the department cites the opinion in *Peabody Coal Co. v. Director, Office of Workers' Compensation Programs,* 778 F.2d 358, 362 (7th Cir. 1985).

We find that argument less than convincing, since use of the word "criteria" in the previous subsection was specifically limited to the context of "medical tests," while omission of that restrictive terminology in the subsequent subsection only serves to indicate a general usage of the word "criteria" was intended, unencumbered by the limiting terminology. Obviously, Congress did not qualify its use of the term "criteria" in one subsection, but did in another. Since Congress is presumed to act intentionally when it includes particular language in one provision of a statute, but omits that language from another provision, we conclude that "criteria" should be accorded the broader meaning. *See, e.g., Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983).

Our view of the statute is not necessarily in conflict with *Peabody Coal,* since the reference to "medical criteria" in that opinion may be viewed as *dictum* since it was not necessary to the court's holding that the Secretary of Labor did not exceed his authority in promulgating the Section 727.203(a) interim presumption.

We also note that the department's argument, that its position is supported by the legislative history of 30 U.S.C. § 902(f)(2), was made and rejected in *Halon v. Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3d Cir. 1983), and *Coughan v. Director, Office of Workers' Compensation Programs,* 757 F.2d 966, 968 (8th Cir. 1985). On this point, the *Halon* court held that:

> The plain language of the statute does not suggest that Congress intended any such modification of the generic term "criteria." The legislative history is, at best, equivocal. References in debate to medical criteria are not dispositive . . . . The occasional specific

> mention of medical criteria does not support an inference that non-medical criteria were to be excluded. Other remarks in the debate suggest that the criteria referred to include adjudicatory standards as well as medical standards.

Id. at 24. (Citation omitted.)

Our review of the legislative history leads us to the same conclusion. Accordingly, we see no reason to place ourselves at odds with the position already taken by the Third and Eighth Circuits on the issues raised by this appeal.

Nor does that conclusion conflict with our opinion in *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985), as suggested by the department.

In *Ramey,* this court was concerned with what specific evidence was required to rebut a presumption of pneumoconiosis under regulations promulgated pursuant to Part C of the Black Lung Act. *See* 20 C.F.R. § 727.203(a). Specifically, *Ramey* held that, even though vocational and medical evidence had been required to rebut the Part B presumption, the Secretary's presentation of medical evidence alone would be sufficient to rebut the Part C presumption. The court reasoned that such a holding was not inconsistent with the no "more restrictive" language because the exact evidence necessary to rebut the presumption was not permanently fixed by the language in 30 U.S.C. § 902(f)(2), which establishes the no "more restrictive" standard.

Ramey should not be read to suggest that the Part B presumptions no longer apply. On the contrary, *Ramey* should be interpreted to hold that, although the Part B

presumptions are preserved, under certain limited circumstances, the specific evidence necessary to rebut those presumptions may be altered over time.

In the case before us, the question is whether the Part B criteria to invoke the presumption of disability are applicable. *Ramey* is not controlling in this context. Since the issue is one of criteria, as opposed to mere evidence, 30 U.S.C. § 902(f)(2) mandates that we apply the criteria set forth in Part B of the regulations. Accordingly, we must remand for a determination of whether the claimant can meet the Part B criteria.

The Board's decision is reversed and this cause is remanded in order that Kyle's claim to the benefit of an interim presumption may be considered in the context of 20 C.F.R. § 410.490.

RALPH B. GUY, Jr., Circuit Judge, concurring in part and dissenting in part.

I agree with the majority that the issue of Kyle's entitlement to an "interim presumption" of disability under 20 C.F.R. § 410.490 is properly before us, but respectfully disagree with their resolution of this issue.

I would read the statute as the Secretary suggests, as requiring that no less restrictive *medical* criteria be incorporated into the regulations. In support of my conclusion, I would offer the reasoning of the dissent in *Halon v. Director, Office of Workers' Compensation Programs,* 713 F.2d 21 (3rd Cir. 1983). In *Halon,* Judge Weis made a thorough analysis of the purpose and legislative history of the statutory language in question, and I find this analysis more persuasive than that of the majority here.

No. 85-3535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED KYLE,
Petitioner,
v.
U.S. DEPARTMENT OF LABOR, ET AL.,
Respondents.

ORDER

BEFORE: MERRITT, GUY and NORRIS, Circuit Judges

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

Filed
Sep. 22, 1987

No. 85-3535

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FRED KYLE,
Petitioner,
vs.
U.S. DEPARTMENT OF LABOR, DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAM
Respondents.

ORDER

Upon consideration of the motion of the National Council on Compensation Insurance for leave to intervene in behalf of respondent,

IT IS ORDERED that the motion be and it hereby is, GRANTED.

ENTERED BY ORDER
OF THE COURT

/s/ JOHN P. HEHMAN
JOHN P. HEHMAN, CLERK

Filed
Jul. 15, 1987

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FRED KYLE, *Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *Respondents.*	**No. 86-3535**

MOTION FOR LEAVE TO INTERVENE AND TO FILE A PETITION FOR REHEARING

NOW COMES, the National Council on Compensation Insurance ("NCCI"), by and through its attorneys, Pietragallo, Bosick & Gordon, and herewith presents this Motion for Leave to Intervene in the above-styled matter pursuant to F.R.A.P. 15(d) and F.R.C.P. 24. The movants seek intervention to file a Petition for Rehearing and otherwise participate in the litigation, stating as follows:

1. This Honorable Court issued its opinion in the above-styled matter on or about May 18, 1987. The *Kyle* decision interpreted 30 U.S.C.A. Section 902(f)(2) as requiring the application of 20 C.F.R. Section 410.490 ("interim regulations") to Part C claims under the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C.A. Section 901 ("the Act"). This decision effectively invalidated the Department of Labor regulations at 20 C.F.R. Section 727.203 ("DOL regulations") finding them contrary to the statutes' "not more restrictive" language. Accordingly, *Kyle* revived the interim regulations making

them applicable to industry-responsible claims previously thought to be governed by the DOL regulations.

2. This Honorable Court granted Respondents' request for enlargement of time to present a Petition for Rehearing. Said extension extended the time for Petitions for Rehearing until July 1, 1987.

3. The NCCI is a voluntary, nonprofit, statistical research and rate-making organization supported by the insurance industry. Its primary function is the preparation and administration of rates, rating plans and systems for workmen's compensation insurance in thirty-five (35) states. It also administers several multi-state "insurance pools" providing re-insurance for workmen's compensation policies accepted by various pool members, including over 600 insurance company-pool members across the nation. One such "pool" is the National Workers' Compensation Reinsurance Pool, pertaining to policies under the Act. In addition to reinsuring commercially viable policies, the national pool also offers workmen's compensation coverage to coal operators unable to secure coverage in the open market. This assigned-risk function is an interest unique to the NCCI national pool. The NCCI is also a rate-making body which provides actuarial data upon which workmen's compensation rates are based in numerous states. Since such rates are determined, in part, upon past underwriting experience, the revival of the interim regulations and their application to Part C claims against coal mine operators and insurers will effectively nullify the rates and rating plans in thirty-five states. Individual pool members will also be directly affected as they reinsure workmen's compensation policies providing coverage to operator's potentially liable for benefits under Part C of the Act. Insurance reserves set from prior claims experience under the DOL regulations may now be

insufficient to fund liabilities devolving upon NCCI industry members and the national pool.

4. The *Kyle* decision substantially impacts coal mine operators and their insurance carriers by altering the rules upon which their interests will be adjudicated for thousands of pending claims. Yet, the Respondent in *Kyle* was the Department of Labor representing the Black Lung Disability Trust Fund ("Trust Fund"), which is responsible for benefits largely where no responsible coal mine operator can be identified. *See*, 20 C.F.R. Section 725.490(a). No coal mine operator nor carrier participated in the instant litigation. Thus, the rights and interests of the coal and insurance industries have been determined in their absence without notice or opportunity to be heard on these important issues. The presence of the Trust Fund is inadequate to protect those interests as the Fund is not directly liable for Part C benefits, nor does the Fund prepare insurance rates or rating plans.

5. Absent intervention in the present controversy, the Movants will be deprived of any opportunity to protect their interests as *Kyle* substantially determines the rights of Part C litigants in the total absence of Part C defendants.

6. The NCCI only recently learned of the pendency of the rehearing in the *Kyle* matter. As the NCCI will endeavor to comply with the July 1, 1987 deadline hereinbefore mentioned, no undue delay or prejudice will befall the original parties to the litigation.

7. The NCCI seeks intervention to, *inter alia* raise the following arguments:

(a) The 1977 Reform Act setting forth the "not more restrictive" language applied only to

medical criteria as the indentification of Section 410.490, as the "interim medical standard" throughout legislative history clearly indicates. Based upon recommendations from the HEW, DOL and the General Accounting office, Congress rejected the continued use of Section 419.490 to new DOL claims. Congress intended only that the medical standards of Section 419.490 be used as a benchmark for new DOL standards. Since the statutory language refers only to medical standards and since the DOL regulations utilize medical criteria as liberal as Section 419.490, the DOL regulations comport with the "not more restrictive" criterion.

(b) Application of Section 419.490 to responsible operator claims violates the Administrative Procedure Act ("APA"), as the 1972 publication of the proposed Section 410.490 failed to afford coal operators "notice" that the regulatory standard would be applied to operator claims after June 30, 1973. Thus, Section 410.490 is invalid as to coal operators being devoid of compliance with the APA requirements. *See*, 5 U.S.C.A. Section 553.

(d) Section 410.490 is an invalid exercise of administrative rule-making as the regulation is inconsistent with its enabling legislation.

(e) Application of Section 410.490 to responsible-operator claims deprives operators and carriers of constitutional due process by eliminating all but two defenses to the presumption of entitlement. The elimination of these defenses further deprives the operator/carrier

of a full and fair hearing as required by the APA. *See*, 5 U.S.C.A. Section 556(d).

WHEREFORE, the NCCI respectfully moves this Court to grant this Motion for Leave to Intervene and to File a Petition for Rehearing in the above-styled matter.

Respectfully submitted,

PIETRAGALLO, BOSICK & GORDON

By ...../s/ MARK GORDON.....
MARK GORDON, ESQUIRE

By ...../s/ DANIEL D. HARSHMAN.....
DANIEL D. HARSHMAN, ESQUIRE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served upon the following parties of record by U.S. Mail, postage prepaid, this 23rd day of June, 1987:

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BRB No. 82-1968 BLA
OWCP No. 405-03-3687

FRED KYLE, *Claimant-Petitioner,* v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR *Respondent.*	**NOT-PUBLISHED** **FILED** **MAY 17, 1985** **DECISION** **and** **ORDER**

Appeal of the Decision and Order of Arthur C. White, Administrative Law Judge, United States Department of Labor.

Louise Katz, Houston, Texas, for claimant.

Roscoe C. Bryant III (Francis X. Lilly, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Counsel for Benefits Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: RAMSEY, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (81-BLA-4521) of Administrative Law Judge Arthur C. White denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The administrative law judge found that claimant had established 8½ years of coal mine employment and, thus, considered claimant's entitlement pursuant to Subpart D of 20 C.F.R. Part 410. He determined that claimant has pneumoconiosis, but concluded that claimant had failed to establish that he is totally disabled from pneumoconiosis or a chronic lung disease which arose out of his coal mine work.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

An administrative law judge's finding of length of coal mine employment will be affirmed where it is based upon a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hall v. Director, OWCP*, 2 BLR 1-998 (1980). The administrative law judge's finding that claimant's principal occupation from 1937 to 1951 was that of coal miner reflects that he did take claimant's testimony into consideration. The administrative law judge, however, may credit and rely upon Social Security records where claimant's memory is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). Since claimant's testimony regarding his coal mine work did not fill in the gaps in the Social Security earnings

record and reflects that he had a difficult time recalling the details of his coal mine employment, the administrative law judge properly relied upon the earnings record. We, therefore, affirm the administrative law judge's finding of 8½ years of coal mine employment as it is based upon substantial evidence.[1]

In finding that claimant had not met the requirements of 20 C.F.R. Part 410, Subpart D, the administrative law judge considered the results of a physical examination performed by Dr. Strauss in January 1979 and medical reports of Dr. Stephen M. Hessl and Dr. Sarah B. Long. Claimant contends that the administrative law judge erred in finding claimant not totally disabled pursuant to Section 410.426(d) in light of the x-rays, medical reports, and lay evidence. Specifically, claimant contends that the administrative law judge erred in relying upon Dr. Long's opinion of no total disability because it is merely a recitation of claimant's medical history rather than a reasoned medical report. Dr. Long's opinion contains an evaluation of the objective data in the record, including the pulmonary function studies and blood gas studies, in addition to a recitation of claimant's symptoms. Her report states her professional opinion that claimant is not disabled by his pneumoconiosis based upon that data.

Claimant also argues that the administrative law judge erred in finding Dr. Long's report consistent with the positive x-ray of record and reports of examining physicians indicating the presence of chronic obstructive lung disease

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[1]Claimant argues that, assuming ten years of coal mine employment, the sole x-ray of record, which was positive, would invoke the interim presumption pursuant to subsection (a)(1) of 20 C.F.R. § 727.203. Since we affirm the administrative law judge's finding of 8½ years of coal mine employment, we need not address this contention.

and pneumoconiosis. The positive x-ray and other medical reports finding lung disease and pneumoconiosis have no bearing upon the issue of Dr. Long's determination of no *disability* due to pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983), *petition for review denied*, 738 F.2d 420 (3d Cir. 1984) (table).

In addition, there is no evidence of record which could support a finding that claimant is totally disabled pursuant to Section 410.426. The pulmonary function studies of record do not meet the criteria set forth in Section 410.426(b). Dr. Strauss did not evaluate the severity of claimant's impairment. Dr. Long explicity stated that claimant is not totally disabled from pneumoconiosis and that any impairment he may have is due to smoking. Dr. Hessl's evaluation of claimant's disability as a "Class III respiratory impairment" amounts to only 25-35% impairment, which the administrative law judge chose not to interpret as establishing total disability. *American Medical Association Guides to the Evaluation of Permanent Impairment* at 75 (1977); *see Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Claimant's lay testimony alone, absent corroborating medical evidence, is insufficient to establish total disability by a respiratory or pulmonary impairment pursuant to Part 410. *Centak v. Director, OWCP*, 6 BLR 1-1072 (1984). Accordingly, we affirm the administrative law judge's determination that claimant has not met his burden of proving that he is totally disabled from a chronic lung disease arising out of coal mine employment.[2]

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[2]Claimant also argues that it was error for the administrative law judge to rely upon Dr. Long's report because she relied heavily on the documented five years of coal mine employment in determining that

(Continued on next page)

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

/s/ ROBERT L. RAMSEY
ROBERT L. RAMSEY, CHIEF
ADMINISTRATIVE APPEALS JUDGE

/s/ ROY P. SMITH
ROY P. SMITH
ADMINISTRATIVE APPEALS JUDGE

/s/ NANCY S. DOLDER
NANCY S. DOLDER
ADMINISTRATIVE APPEALS JUDGE

Dated this 17th
day of May 1985

(Continued)
any disability claimant may have did not arise out of coal mine employment, but rather was caused by his smoking. Claimant also argues that Dr. Long's opinion regarding causation does not meet *Blevins* standards. *See Blevins v. Peabody Coal Co.*, 6 BLR 1-750 (1983). We need not address these contentions because the administrative law judge's denial of benefits was based primarily on his finding that claimant is not totally disabled. The discrepancy between five years and 8½ years of coal mine employment would not alter Dr. Long's conclusion of no total disability. *See O'Neal v. Director, OWCP*, 6 BLR 1-1132 (1984).

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

DATE ISSUED: SEPT 22, 1982

In the Matter of

FRED KYLE,
Claimant,
v.
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party in Interest.

Case No. 81-BLA-4521
OWCP No. 405-03-3687

LOUISE KATZ, ESQ.
For the Claimant

ROSOCE C. BRYANT, III, ESQ.
For the Party In Interest

Before: ARTHUR C. WHITE
Administrative Law Judge

DECISION AND ORDER-REJECTION OF CLAIM

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq.* In accordance with the Act, and the regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were

so totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing was held[1] in Chicago, Illinois, on May 25, 1982, at which all parties were afforded full opportunity to present evidence and argument, as provided in the Act and the regulations issued thereunder, found in Title 20 of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that Title.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Coal Miner

The claimant was a coal miner within the meaning of § 402(d) of the Act and § 725.202 of the regulations for approximately 8½ years ending in 1951. I find that Mr. Kyle's principal occupation from 1937 to 1951 was that of a coal miner except for the 3½ years he spent in military service. However, he had earnings from coal mine employment for only 34 quarters, so it can be seen that his coal mine work was rather sporadic. Even though he worked as a coal miner during 19 quarters between the second quarter of 1937 to the second quarter of 1942, and he did some coal mine work during approximately 17 quarters between 1946 and 1951, I am unable to credit him with more than 8½ years of coal mine work. I have given him credit for several quarters in which the Social Security records reflect less than one month of work, assuming he was paid the

[1]The transcript of hearing will be hereafter referred to as T.; other abbreviations will be as follows: Director's exhibits D.; and Claimant's exhibits, C.

minimum wage rate then in effect. Mr. Kyle has the burden of establishing his period of coal mine work. See *Rennie v. United States Steel Corp.*, 1 BLR 1-859 (1978). He has established less than 10 full years of work in the mines.

Date of Filing

The claimant filed his claim for benefits under the Act on February 15, 1980. The claim is timely filed since no limitations in the Act on the time within which claims may be filed are applicable to claims filed on the date the claim was filed in this case.

Pneumoconiosis and Total Disability

Mr. Kyle underwent a chest x-ray in April 1980 (D. 12, 13) which was interpreted by J. J. Fitzpatrick, M.D., a board-certified radiologist, to show l/o pneumoconiosis. In view of the opinion of the Benefits Review Board in the case of *Tobias v. Republic Steel Corp.*, 2 BLR 1-1277 (1981), I consider the opinion of Dr. Pitman (D. 13) only to the extent he found the x-ray film to be of acceptable quality. I, therefore, determine that Mr. Kyle has pneumoconiosis and that it has been depicted by x-ray § 410.414(a)).

As Mr. Kyle had less than 10 years of coal mine work and his claim was filed prior to the effective date of Part 718 of the regulation, his claim must be adjudicated under the provisions of Part 410.

Under the provisions of § 410.424(a), a miner may be presumed to be totally disabled if blood gas studies reveal impairment of the transfer of oxygen from the lungs to the blood as set forth in the appendix of Part 410, or if cor pulmonale or congestive heart failure with the symptoms described in the appendix are manifest. As claimant's

blood gas studies have been substantially within normal limits and as cor pulmonale or congestive heart failure has not been established, Mr. Kyle is not presumed to be totally disabled under § 410.424(a).

The next criterion for considering the question of total disability, is set forth in § 410.426. In this regard, pulmonary function studies with findings at or below the levels set forth in subparagraph (b) would invoke the presumption of total disability. Initially, I conclude that claimant is 70" tall. It would be necessary for his pulmonary function studies to show an FEV_1 of 1.8 or lower and a MVV of 65 or lower for Mr. Kyle to be presumed to be totally disabled under this subsection. In March 1979, Mr. Kyle's FEV_1 was 3.1 and his MVV was 106. In April 1980, his FEV_1 was 2.5 and his MVV was 46.8. Hence, he may not be presumed to be totally disabled under § 410.426(b).

Mr. Kyle could also be presumed to be totally disabled under § 410.426(d). This regulation would be applicable if other relevant medical evidence established the existence of a chronic pulmonary disease which was of such severity that it precluded the claimant from accomplishing his previous coal mine work and also considering his age, his education and his work experience, prevented him from performing comparable and gainful work. It would also be necessary to show that the chronic pulmonary disease arose out of employment in the nation's coal mines. (§ 410.414(c)).

When claimant was examined in January 1979 (D. 6), tactile fremitus, percussion, resonance and vocal resonance were equal or normal bilaterally. There were no rales, rhonchi or wheezing. X-rays showed overaeration of the lungs, which apparently formed the basis for the diagnosis of chronic obstructive lung disease. S.M. Hessl, M.D.,

examined claimant in May 1980 (D. 15). The doctor diagnosed chronic bronchitis and coal workers' pneumoconiosis which he attributed to coal mine work. He concluded that claimant had an AMA Class III respiratory impairment. Diagnosis were also reported of arteriosclerotic heart disease and right bundle branch block.

Claimant's file was referred to a medical consultant (D. 17) who concluded that he was not totally disabled from pneumoconiosis or a respiratory standpoint. The physician also concluded that the claimant's history of smoking was the primary cause of any respiratory disability he had.

Mr. Kyle has the burden of proving that his pneumoconiosis arose out of his coal mine work and that he is totally disabled because of the disease. (§ 410.414(b)). While Dr. Hessl states that Mr. Kyle has an AMA Class III respiratory impairment which arose out of his coal mine work, the Department of Labor medical consultant concludes that claimant is not totally disabled from a respiratory standpoint and that any respiratory disability he has is unrelated to his coal mine work.

I am not bound by the theory or opinion of any given medical witness. *See Todd Shipyard Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). However, I do consider Dr. Long's opinion to be in keeping with the objective findings or lack thereof, which are normally considered to be indicative of a significantly disabling respiratory disease. Further, claimant's post-1951 work history as demonstrated by his Social Security records in addition to his smoking history could very well account for his chronic obstructive lung disease and the overaeration of his lungs. In any event, I conclude that Mr. Kyle has not met his burden of proving that he is totally disabled from pneumoconiosis or

a chronic lung disease which arose out of his coal mine work.

Entitlement

The claimant is not entitled to black lung benefits.

Attorney's Fee

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case the Act prohibits the charging of any fee to the claimant for representation services rendered to him in pursuit of his claim.

ORDER

The claim of Fred Kyle for benefits under the Act is denied.

/s/ ARTHUR C. WHITE
ARTHUR C. WHITE
ADMINISTRATIVE LAW JUDGE

UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADMINISTRATIVE PROCEDURE ACT

* * *

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion or irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be

prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

BLACK LUNG BENEFITS REFORM ACT OF 1977

§ 402. Definitions

For purposes of this title—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health, Education, and Welfare for claims under part B of this title, and by regulations of the Secretary of Labor for claims under part C of this title, subject to the relevant provisions of subsections (b) and (d) of section 413, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 223(d) of the Social Security Act; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health, Education, and Welfare, or subject to a determination by the Secretary of Labor, under section 435(a);

(B) any claim which is subject to review by the Secretary of Labor under section 435(b); and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive that the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

REGULATIONS OF HEALTH, EDUCATION, & WELFARE

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of

medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally diabled due to pneumoconiosis at the time of his death, or his death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as

the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish the the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

REGULATIONS OF DEPARTMENT OF LABOR

§ 727.203 Interim presumption

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis,

or to have been totally disabled due to pneumoconiosis at the time of his death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV$_1$	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

Supreme Court, U.S.
FILED
MAR 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1065

In the Supreme Court of the United States

October Term, 1987

NATIONAL COUNCIL ON COMPENSATION INSURANCE
Petitioner,

v.

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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INTRODUCTION

This case comes before the Court on two separate Petitions for Certiorari, one filed by the federal government (87-1045) and the other filed by the National Council on Compensation Insurance ("NCCI"), an intervenor in the Court below (87-1065). The Respondent does not oppose certiorari in either case, but nevertheless suggests both petitions be held in abeyance and disposed of in light of the anticipated decision in the similar cases of *Sebben* or *Broyles*.[1] There is, therefore, agreement on the necessity of Certiorari to review these important issues. The Respondent's suggestions of abeyance, however, are not compelling as his arguments are neither relevant to the issues raised in NCCI's Petition nor supported by a careful examination of the present record.

ARGUMENT

There are essentially three reasons offered by the Respondent as grounds for holding NCCI's Petition in abeyance. The first portrays NCCI as a litigant with little procedural or substantive interest in this litigation. Brief of Kyle at 4-5. The Respondent argues NCCI's intervention after the circuit's initial ruling[2] somehow demonstrates an attenuated "procedural" involvement which justifies placing the Petition in limbo. The fundamental flaw with this notion is that NCCI was unaware of the lower court's

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[1] *Pittston Coal Group v. Sebben*, Nos. 87-821 & 87-827 (Sup.Ct., filed November 21, 1987). The Court accepted certiorari in both petitions on February 22, 1988. 56 U.S.L.W. 3555. *Broyles v. Director, Office of Worker's Comp. Programs*, 824 F.2d 327 (4th Cir., 1987), *cert. filed* (No. 87-1095, filed December 29, 1987).

[2] The Sixth Circuit issued its decision on May 19, 1987, Record at 1a, but granted an enlargement of time until July 1, 1987 for Petitions for Rehearing. Whereas, NCCI's Motion for Leave to Intervene on Rehearing was served on June 23, 1987. Record at 18a. Its motion was granted on July 15, 1987. Record at 12a. Rehearing was later denied on September 22, 1987. Record at 11a.

intention to transfer §410.490 to Part C claims *until* the Court issued its decision. Record at 15a. Indeed, NCCI's interest in this litigation did not arise until the sixth circuit altered the rules upon which the interests of NCCI's constituents were adjudicated.[3] Prior to that ruling, the sixth circuit action did not impair or impede NCCI's interests such that it could have intervened. *See* F.R.C.P. 24. As to the "substantive" matters, the Respondent erroneously argues that insurance companies have no interest in black lung adjudications as they are never parties to administrative claims. Brief of Kyle at 5. On the contrary, all coal mine operators are required to secure their liability by proper insurance.[4] 30 U.S.C. §933. The insurance company is then substituted for the coal operator and obliged to discharge the administrative and payment obligations imposed upon the operator by the regulatory and statutory scheme. 20 C.F.R. §726.207. Their integral role in the statutory scheme is recognized by the Department of Labor ("DOL") regulations which explicitly require that insurance carriers be made *parties* to Part C claims. 20 C.F.R. §725.360(a)(4). Hardly idle by-standers, NCCI constituents are, in fact, actual parties to black lung claims who will be forced by the sixth circuit's mandate to litigate *their* liability under a new and unforeseen standard. The final portion

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[3]The lower court decision in *Kyle* concluded that 30 U.S.C. §902(f)(2) mandated the use of 20 C.F.R. §410.490 in Part C claims. Record at 10a. Part C claims are those paid by private employers. *Mullins Coal Co. of Virginia v. Director, Office of Workers Comp. Programs*, 56 U.S.L.W 4044, 4045 (Sup.Ct., 1987). Part C claims are also insured and reinsured by NCCI constituents. NCCI Petition at ii. Thus, by changing the rules applicable to Part C, the Sixth Circuit significantly affected the ability of NCCI's constituents to defend or protect their interests.

[4]An operator's liability may be secured through the purchase of commercial insurance policies or through self insurance. 20 C.F.R. §725.494.

Respondent's "interest" argument suggests that NCCI's role is attenuated because none of its constituents will be liable for Mr. Kyle's benefits in the event of an award. Brief of Kyle at 5. Respondent may be correct that benefits in this particular case would be paid by the federal government,[5] but that ignores the fact that NCCI is not contesting the individual entitlement of Mr. Kyle. Instead, its Petition challenges the purely legal issue of which regulatory standard should be applied to Part C claims. The lower court essentially invalidated the DOL rule by directing its wholesale replacement with §410.490. Record at 10a. The lower court thus promulgated a new administrative rule directly affecting NCCI's constituents which, in the view of those constituents, operates unilaterally in favor of miners and deprives defendants of their rights to full and fair hearings. NCCI's intervention was, from the very beginning, directed at the circuit court's ruling on the regulatory standard. *See*, Motion for Leave to Intervene, Record at 13a. Its Petition for Certiorari was likewise framed to secure review of the lower court's sweeping revisions of the regulatory scheme. NCCI Petition at *i*. Simply stated, this appeal concerns the proper regulatory standard applicable to NCCI constituents and not merely the preponderance of evidence available in the individual claim of Mr. Kyle.

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[5]*See*, NCCI Petition at *ii*. No coal operator carrier may be liable for a claim where the miner's last coal mine employment predated January 1, 1970. 30 U.S.C. §932(j)(2). Mr. Kyle's last coal mine employment ended in 1951. Record at 25a. NCCI, however, did not intervene to challenge Mr. Kyle's benefits, but rather to challenge the circuit court's holding on the administrative rule. Record at 15-17a.

Accordingly, the measure of NCCI's interest in this litigation[6] must be judged from the harm occasioned by the new administrative rule and not the payments to Mr. Kyle.

The Respondent next complains that the questions presented in NCCI's appeal were never presented to the lower court panel, "prior to its ruling". Brief of Kyle at 6. As the Court generally declines review of matters never presented below, Respondent asserts that review here is unwarranted. Brief of Kyle at 6. Significantly, the Respondent did not allege that NCCI's issues were never presented below, only that they were never presented before NCCI intervened in the circuit court. NCCI did not intervene until *after* the sweeping decision of the sixth circuit for it was that decision which created the basis and necessity for intervention. The inquiry should not be directed at what NCCI did before it became a party, but what it did afterward. Properly stated, the question is whether NCCI's arguments were presented below so as to allow the appropriate proffers of evidence[7] or legal arguments and to allow the lower court to consider those arguments. *Accord, Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Hormel v. Helvering*, 312 U.S. 552, 556-559 (1941). Such requirements have been satisfied here, for NCCI raised all of its certiorari arguments when it requested leave to intervene. *Compare*, NCCI Petition at *i, with*

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[6]NCCI's interest here is that of an association seeking to assert its interests (i.e., as manager of the Workers' Compensation Pool and the preparer of rating plans) and the interests of its association members who insure operators under Part C. *See generally, Hunt v. Washington State Apple Advertising Com'n.*, 432 U.S. 333, 344 (1977). Here, for example, NCCI constituents will suffer direct financial loss in the form of unjustified benefit payments when §410.490 is erroneously applied to Part C claims insured by those constituents.

[7]The issues in NCCI's Petition are questions of law. Therefore, the evidence offered below could not affect disposition of NCCI's Petition.

Motion for Leave to Intervene, Record at 15-17a. Those issues were fully briefed to the circuit court which, although unpersuaded, specifically found that "the issues raised in the petitions [for rehearing] were fully considered upon the original submission and decision . . ." Record at 11a. No further action is necessary to preserve these issues for review by this Court.

The third and final argument against plenary review of NCCI's Petition questions whether NCCI's interests might adequately be represented by the Petitioners in *Sebben* or *Broyles*. Brief at Kyle at 5. As to the Director, there is ample evidence that he has no interest in any issue apart from the statutory construction argument raised in his Petition. Director's Petition at I. The government has prepared three Petitions for Certiorari on this issue[8] and never once raised any of the issues presented in NCCI's Petition.[9] Therefore, there is no reason to presume the Director's presence will be duplicative of NCCI's. With regard to the industry Petitioners in *Sebben*, NCCI recognizes their interests may be more aligned than the Director's, but the posture of *Sebben* is quite distinct from the case *sub judice*. The *Sebben* claim arises from a mandamus action in district court raising questions as to the propriety of mandamus, class certifications, and the exclusivity of the black lung appellate process. *See, Petition for Writ of Certiorari* at 13-16, *Pittston Coal Group v. Sebben*, No. 87-821 (Sup. Ct. filed November 21, 1987).[10] While these are legitimate

[8]The three petitions are: *Sebben*, No. 87-827; *Kyle*, No. 87-1045; and *Broyles*, No. 87-1095.

[9]The only issue raised by the Director has been one of statutory construction. Whereas, NCCI has preserved several issues important to industry, including statutory construction. *Compare* Director's Petition at I *with* NCCI's Petition at *i*.

[10]Amid these unrelated issues, *Sebben* also raised the regulatory standard question. Pittston Coal Group Petition at *i* (No. 87-821).

issues, they range far afield from the underlying question of the appropriate regulatory standard which is the core issue here. Should the Court dispose of *Sebben* on any of these "unrelated" grounds, the fundamental questions raised in NCCI's Petition would remain unanswered. Given the importance of the regulatory standard and the recurring nature of that question in the various courts, the interests of sound judicial administration militate in favor of certiorari here. Certainly, the granting of NCCI's Petition will not prevent the Court from disposing of *Sebben* on procedural grounds, but will ensure that the fundamental issues raised by NCCI will be decided by this Honorable Court.

CONCLUSION

The issues presented by NCCI's Petition are of considerable importance to an insurance industry that must defend and pay claims under a new and unforeseen regulatory standard. There is simply no merit to the contention that insurers who must pay benefits under a rule, have no "interest" in how or when that rule is applied.

Respectfully submitted,

By /s/ MARK GORDON
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By /s/ DANIEL D. HARSHMAN
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ORIGINAL

Nos. 87-1045 and 87-1065

RECEIVED
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

RESPONDENT FRED KYLE'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Respondent Fred Kyle, pursuant to Sup. Ct. R. 46.1, and for the reasons stated in the attached affidavit, moves for leave to proceed in forma pauperis before this Court. Respondent did not seek leave to proceed in forma pauperis before the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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One of the Attorneys for
Respondent Fred Kyle

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Nos. 87-1045 and 87-1065

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Petitioner,

- v. -

FRED KYLE,

Respondent,

NATIONAL COUNCIL ON COMPENSATION INSURANCE,

Petitioner,

- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED AS RESPONDENT IN FORMA PAUPERIS

I, FRED KYLE, being first duly sworn, depose and say that I am a respondent in the above-entitled case; that in support of my motion to proceed here without being required to prepay fees, costs or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of responding to peetitioners' Petitions for Writs of Certiorari are true.

1. Are you presently employed? **NO**

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

February 1976: monthly wages were approximately $610.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? **YES**

a. If the answer is yes, describe each source of income, and state and amount received from each during the past twelve months.

$414/month in social security benefits; $132 a month in disability benefits from Veteran's Administration.

3. Do you own any cash or checking or savings account? **NO**

a. If the answer is yes, state the total value of the item owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other values property (excluding ordinary household furnishings and clothing)? **YES**

a. If the answer is yes, describe the property and state its approximate value.

My wife and I own the home we live in in Chicago, Illinois. The assessed value of the home is $17,500, and the estimated market value is approximately $40,000. However, the home is mortgaged with a mortgage through the Veteran's Administration; and we pay $187 monthly on the mortgage. The unexpired term of the mortgage is approximately 12 years.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

The following persons live with me and are dependent upon me for support: my wife; my three children, ages 18 years old and younger, and two small grandchildren.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

"OFFICIAL SEAL"
BENIYE CLAY
NOTARY PUBLIC, STATE OF ILLINOIS
My Commission Expires 6/19/91

x Fred Kyle

FRED KYLE

Subscribed and Sworn before me this 11th day of February 1988.

Nos. 87-1045 and 87-1065

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- v. -

FRED KYLE and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

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PARTIES TO THE PROCEEDINGS

The parties to these proceedings are:

1. The Director, Office of Workers' Compensation Programs, United States Department of Labor, who is a petitioner in No. 87-1045, and a respondent in No. 87-1065.

2. Fred Kyle, who is a respondent in both No.87-1045 and in No.87-1065.

3. The National Council on Compensation Insurance ("NCCI"), who intervened in the court of appeals in proceedings to rehear the panel decision. NCCI is a petitioner in No. 87-1065.

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Nos. 87-1045 and 87-1065

In The
SUPREME COURT OF THE UNITED STATES
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Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT FRED KYLE IN OPPOSITION

In No. 87-1045, the Director, while seeking a writ of certiorari to review the court of appeals' decision, does not seek plenary review of that ruling. He asks instead that his petition be held and disposed of as appropriate, in light of the disposition of Broyles v. Director, Office of Workers' Compesnation, 824 F. 2d 327 (4th Cir. 1987), pet. for cert. filed, 56 U.S.L.W. 3484 (U.S. December 29, 1987) (No. 87-1095) ("Broyles"). In No. 87-1065, NCCI does seek plenary review of the court of appeals' ruling, though three of the four questions it presents were not considered, much less resolved, by the panel. Respondent Fred Kyle accepts the Director's (but not NCII's) Statement. See Director's Pet. at 2-8.

The question of which the Director seeks review in No. 87-

1045 is identical to the one of which he seeks review in Broyles. Compare Director's Pet. at (I) with Director's Pet. at (I) in Broyles . (Both presenting question of whether Section 402 (f)(2) of Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), obliges the Director to aply the interim presumption in 20 C.F.R. § 410.490 to certain black lung claimants with less than 10 yers of demonstrated coal mine work.) Moreoever, this same question (the "Section 402(f)(2) question"), is incorporated, in substance, by one of the questions already accepted for review in Sebben v. Brock, 815 F. 2d 475 (8th Cir. 1987), pet. for cert. granted, 56 U.S.L.W. 3568 (February 22, 1988) (Nos. 87-821 & 87-827) ("Sebben"), albeit on the petition of the Pittston Coal Group et al ("Pittston"), rather than the Secretary of Labor (the "Secretary") or the Director [1]. See Brief of Respondents in Opposition ("Op. Cert. Br.") in Broyles at 4-5. (Explaining the overlap). Therefore, respondent submits that the petitions the Director (in No. 87-1045) and NCII (in 87-1065) have filed should both be held and disposed of in light of this Court's decision in Sebben, or, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well. [2]

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[1]. There were two petitions filed in Sebben. In No. 87-821, Pittston filed a petition raising four questions, one of which, as noted in the text, incorporated the Section 402(f)(2) question the Director presents here. In No. 87-827, the Secretary of Labor presented only a single question, one relating to the appropriateness of the mandamus relief the court of appeals in Sebben ordered for the black lung claimants there. Plainly, the Secretary did not regard the Section 402(f)(2) question as one properly presented for plenary review by Sebben, where, among other factors apparently obliging that conclusion, the court of appeals never considered the issue.

[2] Respondent here joins the Broyles respondents in urging this Court to grant certiorari in Broyles without further delay, to review the substantive Section 402(f)(2) question in that case. See Op. Cert. Br. in Broyles.

ARGUMENT

A. The Director submitted his petitions here and in Broyles after the Secretary submitted her petition in Sebben, but before this Court's February 22, 1988 order granting review in Sebben. The Solicitor General's position in the three petitions was that this Court should grant plenary review only of the court of appeals' decision in Broyles. Director's Pet. at 8-9; Secretary's Pet. in Sebben at 16-18. He therefore urged that the petition here "be held and disposed of as appropriate in light of...Broyles." Director's Pet. at 9. Similarly, he urged in his Sebben petition that the Secretary's petition there be held pending disposition of this case, since the remedial questions properly presented in Sebben would not have to be addressed at all, if the Section 402(f)(2) question in Broyles were resolved favorably to the Secretary in Broyles. Secretary's Pet. in Sebben at 16-18.

We agree with the Solicitor General that, as this case and Broyles present an identical issue, they should be disposed of together, and alike. This Court's decision to consider the Section 402(f)(2) question in Sebben, however, obviously diminishes the liklihood that it will review this question in Broyles, as the Solicitor General recommended. Put differently, it now appears as if the Broyles petition may be held for disposition in light of the ruling in Sebben, in accordance with the Court's usual practice when a pending petition for certiorari presents a question accepted for review in another case, see e.g., Keney v. New York, 388 U.S. 490 (1967). Whether the Court chooses to so hold Broyles, or grants certiorari in that case, as respondents there urge in their Op. Cert. Brief, the petition here should be held, and disposed of as appropriate in light of this Court's resolution of the Section 402(f)(2) question in Sebben and/or Broyles.

B. NCCI's petition in No. 87-1065 should also be held and disposed of in light of the Court's rulings in Sebben, and, if certiorari is granted in Broyles, in light of its decision in that case as well. Plenary review is completely unwarranted.

1. NCCI was not even a party to this litigation until after the court of appeals' decision here. It is able to style itself a petitioner only because the court of appeals granted its "Motion for Leave to Intervene and to File a Petition for Rehearing" which it filed in that court on June 24, 1987, five weeks after the panel's ruling. Whether the order allowing intervention was correct is very questionable, on a number of grounds. Even an assumption that the order was correct, however, does not obscure the fact that NCCI'S involvement with this litigation came late and was then limited, following as it did the very ruling it now seeks to overturn. A "party" whose procedural involvement in litigation is so attenuated should be permitted to secure plenary review by this Court only upon a showing that a principal party--here the Director--will not adequately represent its interests, See generally, R. Stern, G.Gressman, S. Shapiro, SUPREME COURT PRACTICE (6th ed. 1986), § 14.5. Cf., SUP CT. 38.4 (Providing that court will ordinarily hear oral argument from only one counsel on each side; divided argument not favored.) But with respect to the Section 402(f)(2) question, which is the only question that the court of appeals' ruling here properly presents, NCCI makes no such showing. See §B.3, infra.

2. NCCI's attenuated procedural involvement in this litigation, see ¶ B.1, supra, is matched by its attenuated substantive interest. NCCI describes itself as a "nonprofit, voluntary association of insurance companies, insuring and reinsuring workmen's compensation policies." NCCI Pet. at ii.

But insurance companies are never parties to administrative proceedings on any claims for black lung benefits. See, 30 U.S.C. §§ 932,934; 26 U.S.C. §§ 4121(a), 9501. Either a coal operator, or the Secretary of Labor himself, by the Director, is the claimant's adversary. Id. Respondent's last coal mine employment, moreover, was before January 1, 1970, and thus there is no "responsible coal mine operator," for his claim (i.e. an operator who could be required to pay any benefits owed). Administrative Law Judge Decision at Director's Pet. pp 15a-16a. Accordingly, the Director was, and is, the lone opponent of Mr. Kyle's claim, and the party responsible for the payment of any benefits due Mr. Kyle, out of federal funds. 30 U.S.C. § 932; 26 U.S.C. § 9501(d). Thus, not even any coal operator that NCCI's member companies insure has an identifiable financial interest in the outcome of respondent's claim. Much less does NCCI. Even a party whose party "status" is unclouded should have to show a more substantial interest than that, to invoke the discretionary exercise of this Court's jurisdiction. See, The Monrosa v. Carbon Black Export, Inc. 359 U.S. 180, 183-84 (1959). Put differently, if plenary review is to be granted here, it should be at the behest of someone with a direct and substantial interest in the litigation. Here that someone is the Director, not NCCI.

3. In its petition, NCCI seeks review of four questions. NCCI Pet. at i. The first question is, in substance, the Section 402(f)(2) question that the court of appeals below addressed, but which this Court has now decided to review in Sebben. See § A. supra. In this context, however, NCCI can offer no presentable argument why the petitioners in Sebben (the Secretary of Labor and Pittston), or, if this Court decides to grant the petition in Broyles, the petitioner there (the Director) will not perfectly well represent whatever interest they have in the resolution of that question. Accordingly, there

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should be no occasion to grant NCCI's petition to allow it to also brief and argue this question to the Court. Its prospective resolution in Sebben, and possibly Broyles, makes it appropriate to hold the petition pending the decisions in one or both of those cases.

The three other questions of which NCCI seeks review reflect its attenuated involvement in this case. These three questions are all ones the court of appeals never decided, and the Director does not present in No. 87-1045. Indeed, none are questions any party even presented to the panel here, prior to its ruling. Moreover, we know of no appellate court that has ever squarely addressed, much less accepted, any of the ambitious contentions these questions carry with them. See NCCI Pet. at 14-17.[3]

This court does not ordinarily consider questions not specifically considered and passed upon by the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976), Adickes v. Kress & Co., 398 U.S. 144, 147 n. 2 (1970), Delta Airlines v. August, 450 U.S. 346,362 (1981) (question presented in petition but not to court of appeals will not be reviewed). Such a rule is to be disregarded only in exceptional cases. See, Stone v. Powell, 428 U.S. 465, 481 n. 15 (1976). NCCI does not explain why this is such a case. Plenary review of any of these questions is therefore unwarranted. At the same time, one of these three questions (Question Presented No. 2 at NCCI Pet. p. i) is similar to a second question taken for review in Sebben. Compare Question Presented No. 2 in No. 87-1065 with Question Presented No. 3 in No. 87-821 (Whether judicial application of 20 C.F.R. § 410. 490 to some black lung claims violates federal

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[3] Under these circumstances, we see no reason to burden this Court by here addressing any of these contentions.

Admnistrative Procedure Act.). NCCI's petition is therefore appropriately held for resolution of this question in Sebben, for substantially the same reasons as it is appropriately held for resolution of the Section 402(f)(2) question in the same case, and possibly Broyles as well.

CONCLUSION

The petitions for writs of certiorari in Nos. 87-1045 and 87-1065 should both be held and disposed of as appropriate in light of the Court's decision in Sebben, and, if the Court grants the Director's pending petition for certiorari in Broyles, in light of its ruling in that case as well.

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March 1988

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